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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANDRE ARTHEL O'ROY, SR., Defendant and Appellant.	C080292 (Super. Ct. No. 14F05817)

A jury found defendant Andre Arthel O'Roy, Sr., guilty on two counts of committing a lewd and lascivious act upon S., his three-year-old step great-granddaughter. The trial court sentenced defendant to an aggregate of 25 years in prison.

In his appellant's opening brief, defendant argued (1) the trial court erred in refusing to hold an Evidence Code section 402 hearing about whether S.'s cousins heard S. accuse them of touching her "bootie" and what that statement meant, and in precluding defendant from cross-examining S. about the alleged accusation; (2) insufficient evidence supported the jury's finding that defendant committed two lewd and lascivious acts upon S.; (3) the trial court abused its discretion in admitting evidence pursuant to Evidence Code section 1108 that defendant had sex with C. when she was 14 years old; (4) his trial counsel rendered ineffective assistance by not objecting to certain testimony by the People's expert on child sexual abuse accommodation syndrome, and by certain questions posed by the prosecutor to the expert; and (5) if this court does not reverse one

of the lewd and lascivious act convictions based on insufficient evidence, punishment for one of those convictions must be stayed pursuant to Penal Code section 654.[1] We issued a decision in October 2018 affirming the judgment.

The California Supreme Court subsequently granted defendant's petition for review and directed us to vacate our decision and reconsider the matter in light of Senate Bill No. 1393 (Senate Bill 1393) (Stats. 2018, ch. 1013), which became effective on January 1, 2019. Senate Bill 1393 amends sections 667 and 1385 to provide trial courts with discretion to strike or dismiss a section 667 prior serious felony conviction enhancement. The parties filed supplemental briefs and they agree Senate Bill 1393 applies retroactively to defendant's case and that remand is warranted for the limited purpose of giving the trial court the opportunity to consider striking the section 667 enhancement.

We will affirm the judgment but remand the matter so the trial court may consider whether to strike the section 667 enhancement.

BACKGROUND

Defendant and his wife C. babysat S. on November 23, 2013.[2] S. was three years and nine months old.

C. left her house for about an hour sometime after about 2:00 p.m., leaving defendant, S. and S.'s cousins D. and Q. at the house. The cousins were playing video games in a bedroom, and S. and defendant were watching television in the living room when C. left.

When C. returned to the home, she saw S. come out of the master bedroom. The normally boisterous and happy S. was very emotional and clingy. C. asked S. what was

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[1] Undesignated statutory references are to the Penal Code.

[2] All dates refer to 2013 unless otherwise stated.

wrong. S. climbed onto C.'s lap and hugged C. tightly. She nuzzled her head on C.'s shoulder and was quiet.

C. said defendant was not acting normally when he walked out of the master bedroom and out of the house.

S.'s mother picked S. up at about 4:30 p.m. She described S. as highly emotional. S.'s mother and C. testified that S. was not herself. They could not figure out why S. was acting that way.

The next day, S. asked to go to her godmother's house. S.'s mother dropped S. off at the godmother's house and picked S. up after work the next day. While the godmother was combing S.'s hair, S. told the godmother that defendant had molested her. S. spoke matter-of-factly. She told her mother about the molestation after her mother picked her up. The next day, S. demonstrated to her mother how defendant touched her, gesturing with two fingers inside her vagina and on the outside.

Dr. Jeffrey Wilson, a pediatrician, examined S. on November 26. The People's expert on child sexual abuse, Dr. Angela Vickers, conducted a forensic examination of S. on June 24, 2015. Neither exam found anything abnormal. Dr. Wilson found no bruising or tearing of the vaginal area or anus and no gaping, which would be evidence of penetration of an erect penis or something larger. Dr. Wilson and Dr. Vickers agreed that digital or slight vaginal penetration might not cause gaping or any visible injury.

S. testified at trial. She was five years old at that time and said she was "kind of nervous." S. said she did not see defendant, whom she called Papa Andre, in the courtroom, although the record indicates he was present. S. said she did not remember a person she called Papa Andre, but she also said Papa Andre touched her vagina with his finger when they were alone in his room. S. recounted that Papa Andre put her on his bed, then he got yogurt from the refrigerator and water, put yogurt on his finger and stuck it in her vagina. She said she did not do anything and did not tell anyone what happened right away. She said that was the only time Papa Andre touched her privates.

At trial, S. said for the first time that she thought what happened was a dream. She explained that dreams are not real but they are real in your head. She said she was a little scared of talking about what happened, but tried to tell the truth, and she told the truth during her Sexual Assault Forensic Evaluation (SAFE) interview.

The People played a recording of S.'s January 27, 2014 SAFE interview. S. told the interviewer the following: Papa Andre took her to his room. They were alone in the room. He threw her on the bed. He touched her vagina over her clothes, then reached in her clothes. He touched her vagina, then dipped some yogurt in water and stuck it in her vagina and moved his fingers around. His fingers were inside her vagina. He stopped when S. screamed loudly.

Dr. Anthony Urquiza testified as an expert for the People regarding child development and memory, child sexual abuse, and child sexual abuse accommodation syndrome (CSAAS). He said he did not interview S. and he would not provide an opinion about whether S. was abused.

Dr. Urquiza said most sexually abused children are abused by someone with whom they have had an ongoing relationship and some ongoing contact. He testified that sexually abused children usually do not disclose right away, but some disclose sooner. He said they are traumatized and a significant change in a child's behavior likely means something happened to them, but a child who exhibits a significant change in behavior is not necessarily sexually abused. Dr. Urquiza added that sometimes a sexually abused child will give inconsistent accounts. And it is not uncommon for sexually abused children to talk about being sexually abused with a flat affect or matter-of-fact tone because that is how they control their distress. Dr. Urquiza explained that a sexually abused child who is anxious, fearful or traumatized might think of what happened as a bad dream in order to cope with the abuse. He said it would not be surprising for a child to say that sexual abuse may have been a dream when the child did not talk about the abuse and the adults in the child's life stopped talking to the child about the abuse. He

explained that CSAAS is a teaching tool for therapists that describes common misperceptions about children who have been sexually abused.

In addition, the People presented evidence of uncharged sexual offenses committed by defendant against C. and his stepdaughter when they were young girls. Defendant had sex with C. when she was 13 years old and defendant was in his 20's and was married. C. became pregnant with defendant's child when she was 13 years old. She later married defendant and the two remained married for 41 years and had other children together. Moreover, in 1987, defendant was convicted on twelve counts of committing a lewd and lascivious act upon a child under the age of 14 (§ 288, subd. (a)) in relation to his stepdaughter. The sexual abuse began when the stepdaughter was 10 years old and it continued for two years. The first instance of abuse occurred when defendant put his hand under the stepdaughter's skirt and touched her vagina over her panties while she was sitting on his lap. He went into the stepdaughter's bedroom at night and touched her vagina with his hands, making skin to skin contact. Other sexual offenses against the stepdaughter included oral copulation and attempted vaginal intercourse.

In this case, the jury convicted defendant on two counts of committing a lewd and lascivious act upon S., namely touching his finger to the outside of her vagina and inserting his fingers into her vagina.

The trial court granted defendant's request to bifurcate trial on the prior strike allegation. Defendant waived his right to a jury trial on the issue and the trial court found the prior strike allegation true. The trial court denied defendant's motion to dismiss the prior strike allegation and his request to stay sentence on count two pursuant to section 654. It sentenced defendant to an aggregate prison term of 25 years.

Additional facts are set forth in the discussion as relevant to the contentions on appeal.

DISCUSSION

I

Defendant contends the trial court erred in refusing to hold an Evidence Code section 402 hearing about whether S.'s cousins heard her remark that the cousins touched her "bootie" and what that statement meant. Defendant also claims the trial court erred in precluding defendant from cross-examining S. about the alleged statement.

A

According to defense counsel, about a month before the molestation by defendant, the cousins decided they did not need a three-year-old girl playing their video games with them, so they moved her out of the room where they were playing. Defense counsel said that when S. came out of the room, she told an adult the cousins were touching her bootie.

Defendant's trial counsel explained that the cousins' parents would not allow the boys to talk with him and they did not produce the boys pursuant to a subpoena. Thus, defendant had no statement from the cousins. Defense counsel wanted the cousins to say if something "happened or didn't happen." In addition, he wanted to show the jury "she's capable of that type of comment" and "she knows how to make things happen in her favor." The trial court asked, "Did something happen in her favor?" Defense counsel responded, "No. No."

The judge originally assigned to try the case said he might conduct an Evidence Code section 402 hearing. But another judge was subsequently assigned to try the case, and the parties agreed the second judge was not bound by the rulings of the first judge. The ruling defendant now challenges was made by the second judge, who actually presided over the trial. The trial court concluded the proffered evidence was speculative, not relevant, and there was no evidence S.'s statement about the cousins was false. The trial court said it was not inclined to bring the cousins in for an Evidence Code section 402 hearing if defendant could not present any supporting evidence, adding that a

402 hearing is about establishing foundation before presenting evidence, not about obtaining evidence from witnesses. The trial court said there was no 402 issue to decide at that point.

B

The trial court determines issues of fact preliminary to the admission of evidence. (Evid. Code, § 310, subd. (a).) "Evidence Code section 402 provides a procedure for the trial court to determine outside the presence of the jury whether there is sufficient evidence to sustain a finding of a preliminary fact, upon which the admission of other evidence depends." (*People v. Galambos* (2002) 104 Cal.App.4th 1147, 1156.) When the relevance of proffered evidence depends on the existence of a preliminary fact, the proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact. (Evid. Code, § 403, subd. (a); *People v. Jackson* (2016) 1 Cal.5th 269, 321.) The trial court screens the proffered evidence and excludes it unless it finds sufficient evidence to sustain a finding of the existence of the preliminary fact by a preponderance of the evidence, i.e., whether there is sufficient evidence to allow a reasonable jury to conclude that it is more probable than not that the preliminary fact exists. (*People v. Cottone* (2013) 57 Cal.4th 269, 283-284; *People v. Herrera* (2000) 83 Cal.App.4th 46, 61.) An Evidence Code section 402 hearing serves "to shield the jury from evidence that is so factually weak as to undermine its relevance." (*Cottone, supra*, 57 Cal. 4th at p. 284.) We review a trial court's decision to deny a request for an Evidence Code section 402 hearing for abuse of discretion. (*People v. Williams* (1997) 16 Cal.4th 153, 197.)

Evidence of a prior false complaint of molestation or rape is relevant to the accuser's credibility. (*People v. Miranda* (2011) 199 Cal.App.4th 1403, 1424 (*Miranda*).) But the prior complaint is relevant only if proven false. (*People v. Winbush* (2017) 2 Cal.5th 402, 469 (*Winbush*); *People v. Bittaker* (1989) 48 Cal.3d 1046, 1097 (*Bittaker*), disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, 919;

Miranda, supra, 199 Cal.App.4th at p. 1424.) The proponent of the evidence has the burden of establishing all preliminary facts pertinent to determining relevancy of the evidence. (Evid. Code, § 403, subd. (a)(1); *People v. Kaurish* (1990) 52 Cal.3d 648, 693.)

Here, the relevant fact upon which the admissibility of S.'s alleged complaint against the cousins depends is the falsity of the alleged complaint. (*Winbush, supra,* 2 Cal.5th at p. 469; *Bittaker, supra,* 48 Cal.3d at p. 1097; *Miranda, supra,* 199 Cal.App.4th at p. 1424.) Defendant did not present evidence that the cousins did not touch S's bootie, and he made no offer of proof that any witness would testify that the cousins did not touch S's bootie. The trial court did not abuse its discretion. (*Winbush, supra,* 2 Cal.5th at p. 469; cf. *People v. Fontana* (2010) 49 Cal.4th 351, 367-371.) In addition, defendant does not cite any authority for the proposition that a trial court may use an Evidence Code section 402 hearing simply to compel testimony from an uncooperative witness.

Defense counsel also sought to question S. about the alleged statement regarding the cousins. The trial court told defense counsel that he would have to comply with Evidence Code section 782 [the procedure for introducing evidence of the accuser's sexual conduct], but the trial court ultimately excluded the evidence as irrelevant and as failing an Evidence Code section 352 balancing test.

Although the trial court was incorrect in stating that defense counsel had to comply with Evidence Code section 782 -- defendant was not seeking to introduce evidence of S.'s sexual conduct (see *People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1454) -- the trial court did not abuse its discretion in excluding the evidence as irrelevant. Defendant made no showing that S's alleged statement was false.

II

Defendant next challenges the sufficiency of the evidence supporting the jury's finding that he committed two lewd and lascivious acts upon S.

In determining whether sufficient evidence supports a conviction, " 'we do not determine the facts ourselves. Rather, we "examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence -- evidence that is reasonable, credible and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.] [¶] . . . "[I]f the circumstances reasonably justify the jury's findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding." [Citation.]' " (*People v. Nelson* (2011) 51 Cal.4th 198, 210.) We do not reweigh evidence or reevaluate a witness's credibility. (*Ibid.*) The effect of this standard of review is that a defendant challenging the sufficiency of the evidence to support his or her conviction bears a heavy burden on appeal. (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1287.)

As we have explained, defendant was charged with two counts of violating section 288, subdivision (a). Count one alleged that defendant touched S.'s vagina outside of her clothes with his finger. Count two alleged that defendant placed his fingers in S.'s vagina. The elements of the crime include the following: (1) the willful commission of a lewd or lascivious act, that is, an act which is lustful, immoral, seductive, or degrading; (2) upon or with the body, or any part thereof, of a child under 14 years of age; (3) with the intent of arousing, appealing to, or gratifying the lust, passions or sexual desires of the defendant or the child. (§ 288, subd. (a); *People v. Memro* (1985) 38 Cal.3d 658, 697, overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.)

A defendant violates section 288, subdivision (a) by fondling a portion of a child's body with the requisite intent. (*People v. Scott* (1994) 9 Cal.4th 331, 343; *People v. Jimenez* (2002) 99 Cal.App.4th 450, 456.) In *Jimenez,* the defendant was charged with multiple counts of violating section 288, committed during a single incident wherein the

defendant fondled different parts of the victim's body and digitally penetrated her vagina and rectum. (*Jimenez, supra,* 99 Cal.App.4th at pp. 452-453.) This court held that when the defendant stopped rubbing an area of the victim's body and inserted his finger in her vagina or rectum, he stopped one lewd act and began another. (*Id.* at p. 456.) A delay between the completion of one lewd act and the commencement of another was not required, and substantial evidence supported the multiple section 288 convictions. (*Id.* at p. 457; see *Scott, supra*, 9 Cal.4th at pp. 337-338, 348.)

Here, substantial evidence supports the convictions. There is sufficient evidence of two touchings, one over the clothes and one inside the vagina.

III

Defendant also argues the trial court abused its discretion in admitting evidence that he had sex with C. when she was 14 years old.

A

The People moved in limine to admit evidence, pursuant to Evidence Code section 1108, that in 1970 or 1971 defendant had sex with C. when she was 14 years old and defendant was between 26 and 27 years old. The trial court admitted the evidence because it involved a sexual offense and it was relevant to whether defendant had a propensity for committing sexual offenses against underage girls. The trial court said the "fact that it occurred in 1971 and then again it happened with his own child in 1986, that becomes more probative because it now establishes a pattern or propensity, if you will, to do the same act over and over." The trial court concluded the prejudicial impact of the evidence was relatively low because defendant and C. later married and they remained married for over 40 years and had children together. It ruled the probative value of the evidence substantially outweighed any prejudicial impact. Defense counsel agreed with the trial judge that defendant could minimize the prejudicial impact of the evidence relating to C.

B

In general, evidence of a defendant's prior uncharged conduct is not admissible to prove the defendant has a criminal disposition or propensity. (Evid. Code, § 1101, subd. (a); *People v. Kipp* (1998) 18 Cal.4th 349, 369.) But Evidence Code section 1108 provides an exception to the general rule. (Evid. Code, § 1101, subd. (a); *People v. Villatoro* (2012) 54 Cal.4th 1152, 1159.) Under that section, evidence that the defendant committed a prior uncharged sexual offense is admissible in a sexual offense case unless it must be excluded under Evidence Code section 352. (Evid. Code, § 1108, subd. (a).)

In enacting Evidence Code section 1108, the Legislature recognized "sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial[, thus,] often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations." (*People v. Falsetta* (1999) 21 Cal.4th 903, 915 (*Falsetta*).) Evidence Code section 1108 allows the trier of fact to consider uncharged sexual offense evidence for any relevant purpose, including defendant's propensity to commit sexual offenses in evaluating the defendant's and the victim's credibility and in deciding whether the defendant committed the charged sexual offense. (*People v. Loy* (2011) 52 Cal.4th 46, 63 (*Loy*); *Falsetta, supra,* 21 Cal.4th at pp. 911-912, 920.)

But uncharged sexual conduct evidence is inadmissible if the probative value of the evidence is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury. (Evid. Code, §§ 352, 1108, subd. (a).) The probative value of uncharged sexual conduct evidence is increased by the relative similarity between the charged and uncharged offenses, the close proximity between the uncharged and charged acts, and the independent sources of evidence in each offense. (*Falsetta, supra,* 21 Cal.4th at p. 917.) The prejudicial impact of uncharged sexual conduct evidence is reduced if the uncharged act resulted in a criminal conviction and a

substantial prison term, ensuring that the jury would not be tempted to convict the defendant simply to punish him for the uncharged act, and that the jury's attention would not be diverted by having to determine whether defendant committed the uncharged act. (*Ibid.*)

We review a trial court's Evidence Code section 1108 and 352 determinations under the deferential abuse of discretion standard. (*People v. Avila* (2014) 59 Cal.4th 496, 515.) We will reverse only if defendant demonstrates the trial court exercised its discretion in an arbitrary manner. (*People v. Robertson* (2012) 208 Cal.App.4th 965, 991 (*Robertson*).)

Defendant argues the uncharged sexual conduct evidence is remote. Certainly, a 42-year gap between the charged offenses and the uncharged offense involving C. is substantial. But defendant did not lead a blameless life during those years. He reoffended in 1983 to 1984 against his stepdaughter, resulting in multiple convictions for violating section 288 in 1987 and a 10-year prison sentence. (See *People v. Harris* (1998) 60 Cal.App.4th 727, 739 [noting that remoteness is generally relevant only if the defendant led a blameless life in the interim].)

Moreover, there is no bright line rule regarding whether a prior act is too remote to be admissible under Evidence Code section 352. (*Robertson, supra*, 208 Cal.App.4th at p. 992.) Courts have determined that uncharged conduct occurring decades before the charged acts were admissible under Evidence Code section 1108. (*Id.* at pp. 992-994 [uncharged prior conduct occurred about 34 years before the charged sexual offenses]; *People v. Branch* (2001) 91 Cal.App.4th 274, 281, 284-285 [uncharged sexual acts were committed over 30 years before the charged sexual offenses occurred] *People v. Waples* (2000) 79 Cal.App.4th 1389, 1392-1393, 1395 [uncharged sexual acts occurred 18 to 25 years before the charged sexual offenses]; *People v. Soto* (1998) 64 Cal.App.4th 966, 977-978, 990-992 [uncharged sexual conduct occurred 20 to 30 years before the trial].)

Defendant also argues the acts involving his stepdaughter and those involving C. are dissimilar because he had intercourse with C. when she was 14 years old and touched his stepdaughter when she was 10 years old. But while similarity increases the probative value of the uncharged sexual conduct, "[i]t is enough the charged and uncharged offenses are sex offenses as defined in section 1108" and the uncharged sexual conduct has a tendency in reason to prove or disprove a disputed fact of consequence to the case. (*Loy, supra*, 52 Cal.4th at p. 63; see Evid. Code, §§ 210, 350.) According to the prosecutor's in limine motion, defendant started molesting his stepdaughter when she was 10 years old and the molestation continued until she was 13 years old. The prosecutor said the acts involving the stepdaughter included oral copulation, digital penetration and attempted vaginal penetration. In comparison, according to the prosecutor, defendant was C.'s bus driver. The prosecutor said defendant had sexual intercourse with C. when she was 14 years old. Although defendant's conduct with C. was not the same as his conduct with the stepdaughter, and the circumstances involving C. were also different, the uncharged acts tended to show his sexual attraction to young girls and a propensity to commit sexual offenses against underage girls with whom he had routine contact.

Defendant further argues in his appellate reply brief that the uncharged sexual conduct involving C. is substantially dissimilar from the charged sexual offenses involving S. But defendant did not raise that argument in his appellate opening brief. We will not consider new arguments raised in the reply brief. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1218-1219; *People v. Taylor* (2004) 119 Cal.App.4th 628, 642.)

The trial court did not abuse its discretion in admitting the uncharged sexual conduct evidence.

IV

Defendant also asserts that his trial counsel rendered ineffective assistance by not objecting to certain testimony by the People's expert on CSAAS, along with prosecutor questions posed to the expert.

A

The trial court granted the People's in limine motion to introduce expert testimony on the delayed and unconvincing disclosure aspect of CSAAS, rejecting defendant's argument that expert testimony on delayed and unconvincing disclosure did not fit the anticipated facts of the case. The trial court ruled that the proffered evidence was relevant to address common misconceptions about the reporting of child sexual abuse. It noted the People offered the evidence for a very limited purpose and the court would instruct the jury on the permissible use of the evidence. Defendant now contends his trial counsel should have renewed his objection to testimony about CSAAS because CSAAS did not apply to this case.

Expert testimony about CSAAS is admissible for the limited purpose of disabusing a jury of common misconceptions concerning how children react to sexual abuse. (*People v. Wells* (2004) 118 Cal.App.4th 179, 188 (*Wells*); *People v. Patino* (1994) 26 Cal.App.4th 1737, 1744.) CSAAS evidence is admissible to show "that the victim's reactions as demonstrated by the evidence are not inconsistent with having been molested." (*People v. Bowker* (1988) 203 Cal.App.3d 385, 394.) Although CSAAS expert testimony is admissible if the issue of a specific misconception is suggested by the evidence (*Patino, supra,* 26 Cal.App.4th at p. 1745), the testimony must be tailored to address the specific myth or misconception. (*Wells, supra,* 118 Cal.App.4th at p. 188; *Bowker, supra,* 203 Cal.App.3d at pp. 393-394.)

B

To establish ineffective assistance of counsel, defendant must prove that his (1) trial counsel's representation was deficient because it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficiency resulted in prejudice to defendant. (*People v. Maury* (2003) 30 Cal.4th 342, 389 (*Maury*); *Strickland v. Washington* (1984) 466 U.S. 668, 687 [80 L.Ed.2d 674, 693].) If defendant makes an

insufficient showing on either of those components, his ineffective assistance claim fails. (*People v. Holt* (1997) 15 Cal.4th 619, 703; *Strickland*, at p. 687.)

We review trial counsel's performance with deferential scrutiny, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and recognizing the many choices that attorneys make in handling cases and the danger of second-guessing an attorney's decisions. (*Maury, supra*, 30 Cal.4th at p. 389; *Strickland v. Washington, supra*, 466 U.S. at p. 689.) We accord " 'great deference to counsel's tactical decisions.' " (*People v. Mickel* (2016) 2 Cal.5th 181, 198 (*Mickel*).) "It is particularly difficult to prevail on an appellate claim of ineffective assistance. On direct appeal, a conviction will be reversed for ineffective assistance only if (1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding." (*People v. Mai* (2013) 57 Cal.4th 986, 1009, italics omitted.)

The People offered Dr. Urquiza's testimony on the subject of delayed and unconvincing disclosure. With regard to unconvincing disclosure, S. testified at trial that she thought the molestation was just a dream. During her SAFE interview, S. initially said defendant touched her one time, then she said defendant touched her vagina a different time. In his closing remarks, defendant's trial counsel pointed out that there were inconsistencies in S.'s SAFE interview statements. He argued that S.'s testimony about a dream meant S. had trouble differentiating between fantasy and reality and S. was not sure the molestation actually happened. Defense counsel argued that Dr. Urquiza's testimony that a child might think of a molestation as a dream as a way of coping with abuse did not apply because S. did not appear to have trouble coping with anything.

Courts have found CSAAS expert testimony admissible when a victim provides inconsistent statements or recants an accusation and the defendant attacks the victim's

credibility. (*In re S.C.* (2006) 138 Cal.App.4th 396, 403-405, 418; *Wells*, *supra*, 118 Cal.App.4th at pp. 185-186, 190; *People v. Harlan* (1990) 222 Cal.App.3d 439, 445, 449-450.) Dr. Urquiza's CSAAS testimony explained why sexually abused children may think what happened was a dream and why they may provide inconsistent accounts. Defendant has not shown the testimony was irrelevant to the issues raised by the evidence. Defense counsel was not ineffective for failing to make a meritless objection. (*People v. Weaver* (2001) 26 Cal.4th 876, 931.)

With regard to delayed disclosure, defendant's trial counsel did not explain why he did not object to expert testimony on that subject. However, defendant's counsel could have reasonably concluded that expert testimony on delayed disclosure was proper because S. delayed in reporting the molestation, even if the delay was not substantial. S. testified she did not tell anyone about the molestation right away. She did not disclose to C. even though C. asked her on the day of the molestation what was wrong. S. also did not tell her mother about the molestation when her mother came to pick her up from defendant and C.'s house and even the next day. Dr. Urquiza testified that sexually abused children usually do not disclose right away, although some disclose sooner. Dr. Urquiza opined that a two or three day delay in disclosing was still a delay, though not a substantial one.

The record also suggests a rational tactical purpose for the lack of objection. Defendant's trial counsel vigorously cross-examined Dr. Urquiza about the need for CSAAS expert testimony and whether the delayed disclosure aspect of CSAAS applied to this case. Counsel may have reasonably decided to cross-examine the expert rather than object. On this record, we cannot conclude that defendant's trial counsel rendered ineffective assistance by not objecting to Dr. Urquiza's testimony about delayed disclosure.

Defendant next complains that his trial counsel allowed the prosecutor to ask certain questions that mirrored the facts of the case. Defendant objects to the following questions posed by the prosecutor to Dr. Urquiza:

(1) "So in a situation you have a three year old child that is sexually abused or touched by, say, a great grandfather that she has a close relationship with, would it be uncommon for her not to tell her mother or grandmother about it even if she sees [them] just moments or hours after the abuse happened?"

(2) "And what about a drastic change in behavior after an alleged abuse happens, would that be, you know, say, for example, a child who is not prone to throwing tantrums or getting emotional, throws a tantrum that is so drastic that . . . the child's mother and great grandmother have never seen a tantrum of that magnitude, is that consistent with a traumatic event or something bad happening to that kid shortly before that change?"

(3) "So if you had a five year old child who hasn't seen a relative since she was three and half years old and was used to seeing that relative in her . . . great grandmother's house, say, once a week or so, and in the time since she was three and half she last saw him his appearance changed drastically in terms of hair color, hairstyle, and weight loss, would you be surprised if she testified she didn't recognize him in a courtroom setting?"

(4) "And would the added stress of being in an unfamiliar environment, say, a courtroom setting, you know, across counsel table, also affect the child's ability to place context?"

(5) "What memory issues might be at play or development issues might be at play if a child describes a past event as a dream?"

It is improper for an expert to testify about CSAAS in a manner that directly coincides with the facts of the case. (*People v. Gray* (1986) 187 Cal.App.3d 213, 218; *People v. Roscoe* (1985) 168 Cal.App.3d 1093, 1100 [expert testimony must be limited to a discussion of victims as a class; the expert must not discuss the victim in the case].) It

is error to admit a CSAAS expert's response to a hypothetical question that closely tracks the facts of the case. (*People v. Jeff* (1988) 204 Cal.App.3d 309, 337-339.) This limitation prevents potential misuse of the expert's testimony as a diagnosis of child sexual abuse based on the specific facts of the case. (*Id.* at pp. 337-338.)

Even if we assume that defendant's trial counsel's representation was deficient because he did not object to the above-quoted questions by the prosecutor, defendant must affirmatively prove prejudice to establish ineffective assistance. (*Mickel, supra,* 2 Cal.5th at p. 198.) "[T]he record must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Maury, supra,* 30 Cal.4th at p. 389) Defendant must show a reasonable probability of a more favorable result. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217-218; *Strickland v. Washington, supra,* 466 U.S. at pp. 693-694.)

Defendant fails to show it is reasonably probable a more favorable verdict would have resulted if his trial counsel had objected to the challenged questions. The jury could not have understood from Dr. Urquiza's responses to the prosecutor's hypotheticals that defendant sexually molested S. Dr. Urquiza told the jury he was not there to provide an opinion about whether S. was sexually abused. Dr. Urquiza testified that he did not know anything about defendant, he did not interview S. or anyone else in this case, and he did not read the police report in this case. In addition, the trial court instructed the jury that Dr. Urquiza's testimony was not evidence that defendant committed any of the charged crimes. The judge admonished that the jury must decide whether the facts in a hypothetical posed to an expert witness had been proven and the jury was not required to accept the expert's opinion as true or correct. The trial court also instructed the jury on the factors it may consider in evaluating the credibility of witnesses and, in particular, a witness who is less than 10 years old. And the jury had an opportunity to observe S.'s

demeanor at trial. We presume the jury followed the trial court's instructions and performed its duty. (*People v. Sibrian* (2016) 3 Cal.App.5th 127, 138.)

Defendant's claims of ineffective assistance lack merit.

V

Defendant argues that if this court does not reverse one of the section 288 convictions for insufficient evidence, punishment for one of those convictions must be stayed under section 654 because the touching of the outside of S.'s vagina over her clothes (count one) was incidental to the touching of the inside of her vagina (count two).

Section 654 protects against multiple punishment where the same act or omission or " 'a course of conduct deemed to be indivisible in time' " results in multiple statutory violations. (*People v. Harrison* (1989) 48 Cal.3d 321, 335 (*Harrison*).) Section 654 is intended to ensure that the defendant is punished commensurate with his or her culpability. (*Id.* at p. 335.) The defendant's intent and objective, not the temporal proximity of his or her offenses, determines whether multiple punishment is permissible. (*Ibid.*) "[I]f all of the offenses were merely incidental to, or were the means of accomplishing or facilitating one objective, defendant may be found to have harbored a single intent and therefore may be punished only once. [Citation.] [¶] If, on the other hand, defendant harbored 'multiple criminal objectives,' which were independent of and not merely incidental to each other, he may be punished for each statutory violation committed in pursuit of each objective, 'even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.' [Citation.]" (*Ibid.*) The fact that the defendant's intent in committing multiple sexual crimes was to obtain sexual gratification does not preclude punishment under section 654 for each sexual offense committed by the defendant. (*People v. Perez* (1979) 23 Cal.3d 545, 552-553.)

In *Harrison*, the defendant was convicted of three counts of forcible sexual penetration (§ 289, subd. (a)) based on a 7- to 10-minute attack during which the defendant inserted his finger into the victim's vagina three times while the victim

resisted. (*Harrison, supra*, 48 Cal.3d at pp. 325-326.) The California Supreme Court held that the defendant was properly convicted of three counts of forcible sexual penetration because a new and separate violation of section 289 was completed each time a new and separate penetration, however slight, occurred. (*Id.* at pp. 329-334.) The Supreme Court also held that section 654 did not require a stay of the sentence for two of the section 289 convictions. (*Id.* at p. 334.) It rejected the defendant's contentions that his three sex acts were part of a continuous transaction. (*Id.* at pp. 336-338.)

The fact that a lewd act (for example, kissing or sexual fondling) preceded other lewd acts does not establish that the first lewd act was merely incidental to or facilitative of the later acts and therefore protected under section 654. (*People v. Madera* (1991) 231 Cal.App.3d 845, 855.) In *Madera*, the defendant rubbed the victim's penis before committing oral copulation and sodomy upon the victim. (*Ibid.*) The Court of Appeal held the fondling was not necessary to commit the oral copulation or sodomy, rejecting the defendant's section 654 claim. (*Id.* at pp. 855-856.) In *People v. Alvarez* (2009) 178 Cal.App.4th 999, the Court of Appeal concluded that while the defendant insisted that kissing the victim merely facilitated his subsequent sexual acts, the trial court could reasonably have concluded the kissing was for the purpose of the defendant's arousal and that, in so doing, he was not facilitating any other form of sexual contact, although that was where things ultimately led. (*Id.* at p. 1007.) The appellate court held none of the lewd acts were necessary to accomplish the others. (*Ibid.*) *People v. Bright* (1991) 227 Cal.App.3d 105, 109-110 and *People v. Blevins* (1984) 158 Cal.App.3d 64, 71-72 held similarly.

Whether section 654 applies in a case is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Vang* (2010) 184 Cal.App.4th 912, 915-916.) We will not reverse the trial court's findings if there is any substantial evidence to support them. (*Id.* at p. 916.) " 'We review the trial court's determination in the light most favorable to the respondent and presume the existence of

every fact the trial court could reasonably deduce from the evidence. [Citation.]' " (*Ibid.*)

The jury convicted defendant of two counts of committing a lewd and lascivious act upon a child based on defendant touching S.'s vagina over her clothes and inside of S.'s vagina with his fingers. The trial court sentenced defendant to the upper term on the first count and a consecutive sentence of one-third the middle term on the second count. S.'s SAFE interview statements support the trial court's finding that defendant committed two separate lewd acts: touching S.'s vagina over her clothes and digitally penetrating S.'s vagina. The trial court could have reasonably found, based on S.'s SAFE interview statements, that touching S.'s vagina over her clothes was not merely incidental to or necessary to accomplish the digital penetration, but was a separate act committed with the requisite lewd intent. Accordingly, we reject defendant's argument that the trial court erred in failing to stay the sentence on one of his section 288 convictions under section 654.

VI

The parties agree that the recent amendments to sections 667 and 1385 made by Senate Bill 1393 apply retroactively to defendant and that limited remand is warranted.

At the time of sentencing in this case, section 1385 did not authorize a trial court to strike or dismiss a section 667 prior serious felony conviction enhancement. (Former § 1385, subd. (b); Stats. 2014, ch. 137, § 1).) The trial court noted it had no such authority and imposed a five-year enhancement pursuant to section 667, subdivision (a). Effective January 1, 2019, however, Senate Bill 1393 amended sections 667 and 1385, deleting the provisions in those statutes that prohibited a trial judge from striking a section 667 prior serious felony conviction enhancement in furtherance of justice. (Stats. 2018, ch. 1013, §§ 1-2.)

We agree with the parties that the amendments to sections 667 and 1385 apply to defendant. In *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*), the California Supreme

Court stated, "When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Id.* at p. 745.) This includes "acts committed before its passage provided the judgment convicting the defendant of the act is not final." (*Ibid*.) Thus, under *Estrada*, absent evidence to the contrary, we presume the Legislature intended a statutory amendment reducing punishment to apply retroactively to cases not yet final on appeal. (*Id.* at pp. 747-748; *People v. Brown* (2012) 54 Cal.4th 314, 324; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090.) The Supreme Court has applied the *Estrada* rule to amendments giving the trial court discretion to impose a lesser penalty. (*People v. Francis* (1969) 71 Cal.2d 66, 75-76.) As the parties agree, a limited remand is appropriate here.

DISPOSITION

The judgment is affirmed. The matter is remanded to permit the trial court to consider whether to strike or dismiss the section 667 enhancement pursuant to section 1385, as amended by Senate Bill 1393.

/S/
MAURO, J.

We concur:

/S/
HULL, Acting P. J.

/S/
MURRAY, J.